

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Streamlining Deployment of Small Cell)	WT Docket No. 16-421
Infrastructure by Improving Wireless Facilities)	
Siting Policies)	
)	
Mobilitie, LLC Petition for Declaratory Ruling)	

COMMENTS OF WYOMING ASSOCIATION OF MUNICIPALITIES

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SUMMARY

The Petitioner (herein Mobilitie) seeks a ruling interpreting 47 USC § 253(c) of the Communication Act of 1934, as amended, in three respects.

1. Mobilitie seeks a declaration that “fair and reasonable compensation” is limited to permitting a local government to recoup its costs relating to issuing permits and managing the rights-of-way, but nothing else;
2. That the Commission interpret “competitively neutral and nondiscriminatory” to mean charges that do not exceed those imposed on other providers for similar access; and
3. That the Commission should interpret “publicly disclosed by such government” to obligate local governments to make available the right-of-way charges previously imposed on others.

The language of § 253(c) specifically provides that the section does not affect the authority of a state or local government to manage the public right-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitive neutral and nondiscriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Wyoming’s statutory framework regulating franchises is long and well established and is a matter of unique concern to local governments. Wyoming laws relating to franchises are long standing and are uniformly applicable to all municipalities in Wyoming. These laws were adopted decades ago and have been applied to installation of infrastructure by utilities in public ways.

The proposal before the Commission raises questions of fairness and application of these laws to those telecommunication companies who hold certificates of public convenience and necessity. For example, in Wyoming, a regulated electrical utility is subject to the franchise laws and must comply with the franchise statutes when dealing with placement of infrastructure in public streets, alleys or rights-of-way. The proposal before the Commission would place certain groups who hold certificates of public convenience and necessity outside of the operation of the statutes and exempt from their provisions – contrary to federal law.

The proposal before the Commission would preempt any and all local planning, zoning and public safety regulation of infrastructure placement by removing consideration of those decisions from the local authority.

Small cell infrastructure providers like Mobilitie are protected by the ability to challenge planning, zoning and public safety decisions and franchise agreements which they believe are arbitrary and not in conformance with state law.

Finally, the proposal raises implications of inverse condemnation wherein entities place infrastructure in streets, alleys, and right-of-ways without adequate and just compensation.

I. INTRODUCTION

The Wyoming Association of Municipalities (WAM) is a non-profit, public service organization that represents all 99 incorporated municipalities in the State of Wyoming. Wyoming law as regards issuance and regulation of franchises is uniformly applicable to all 99 member communities.

WAM recognizes, as does the National League of Cities and others, the benefits of installation of advanced communication infrastructure and the role that it plays in the vitality of communities. WAM believes that the Wyoming state regulatory scheme is equally applied to all those holding certificates of public convenience and public necessity and further that federal guidelines and interpretations of the Telecommunications Act sought by Mobilitie are actually contrary to its position taken with respect to Wyoming cities and towns, and if adopted would result in a de facto preemption of the application of this long established authority, which would then cause confusion and act as a detriment to long term planning and use of such facilities and invoke questions of fundamental fairness among franchise holders under Wyoming law.

II. WYOMING'S FRANCHISE LAWS AND APPLICATION OF THOSE LAWS

Wyoming Statutes relating to the granting and regulation of franchises by cities and towns are uniformly applicable to all cities and towns in the State of Wyoming and provide that those municipalities have the power and authority to:

(xxxiii) Grant franchises for such terms as the governing body deems proper to any utility company, provided no franchise may be entered into with any person in which that person is given an exclusive right for any purpose whatsoever and:

(A) Grant to any franchisee utility company the privilege to install and maintain necessary installations under or over any streets, alleys or avenues ... Wyo. Stat. §15-1-103(a).

Any municipality in Wyoming contemplating issuance of a franchise to any utility company is bound by these provisions. These laws lay out the frame work from which all

municipalities dealing with franchises must operate within. Further, these laws dealing with franchises and grant of franchises were originally adopted in 1895.

Mobilitie, at least in Wyoming, has held itself out as a public utility with the right to “occupy the public right-of-way”. See, Mobilitie, LLC regulatory status, submitted herewith. Mobilitie’s position, in Wyoming, is that condemnation laws grant it, as a public utility, the right to occupy public roads and streets with its infrastructure. The provision of the law relied upon by it provides that as a public utility, it must first try to negotiate, with a city or town, the city’s permission to install such infrastructure before proceeding to seek to condemn the property interest where the installation is sought. Part of the negotiating process is a franchise agreement that could be negotiated to include a template for planning, review and construction of all facilities by Mobilitie for any given community.

Mobilitie infers, in its Petition, that application of laws like those existing in Wyoming are roadblocks that delay the installation of its infrastructure. It offers no facts demonstrating that this has occurred in Wyoming.

In this state, Mobilitie holds itself out as a public utility to assert the power to exercise eminent domain and garner protections afforded such entities to the regulated use of city roads, streets and alleys. As such, it is obligated to seek a local governing body’s permission to install its facilities. Wyoming’s laws are structured so that Mobilitie, in a franchise agreement, can seek such permission for all facilities under specifically agreed to parameters, including planning, construction and compensation for such use.

Now, Petitioner seems to ask the Commission for a declaration or decision that directs a Wyoming city or town on what it can or cannot negotiate and how that negotiation

must occur with respect to compensation for installation or limit the charges that may be imposed on it to those imposed on another telecommunication public utility regardless of the nature of the second utility's planning, installation and operation model.

On the one hand, Mobilitie seeks to avail itself of the benefits of being a public utility under state law and, at the same time, invoke federal preemption to nullify its obligations under the state regulation.

Federal law specifically provides that nothing in Section 253 affects the authority of a city or town to manage the public right-of-way OR to require fair and reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis for use of public rights-of-way on a nondiscriminatory basis. The Section deals with (1) authority to manage public right-of-way and (2) compensation for such use.

If the Petition were granted, then city and town authority to manage the right-of-way under franchise agreements is abrogated or at a minimum arguably subject to federal preemption. This seems inconsistent with the plain language of the law.

Wyoming laws of franchises applies to every city and town. Telecommunication companies have chosen to negotiate franchise agreements addressing the very concerns raised by Mobilitie. It has not done so. Rather, it seeks the benefit of the franchise laws without sharing in the obligation or responsibility of the law.

III. FUNDAMENTAL FAIRNESS CONCERNS ARISE IF THE PETITION IS GRANTED

As mentioned above, some telecommunication providers in Wyoming have chosen to recognize the benefit-burden analysis of negotiating franchise agreements with cities and towns. These providers negotiate planning, review, approval, installation and compensation for infrastructure on a macro scale – every aspect for that one provider in that one community. As long as the agreement freely negotiated and entered into is followed, the government and industry has clear expectations of the processes to follow and the results that are expected. If the Petition were granted, a situation would be created where one telecommunication provider's compensation payment structure would be governed by a franchise agreement and a similarly situated provider would be governed by the Commission. The potential for this result seems fundamentally unfair for one provider who has complied with the Wyoming's franchise structure and one who does not.

It would then seem the result that there would be two classes of telecom providers created which relate to issues of authority to manage public right-of-way and a compensation structure that is not competitively neutral.

IV. STATE PLANNING, ZONING AND PUBLIC SAFETY ISSUES HAVE BEEN AND WILL BE A LOCAL CONTROL AND CONCERN ISSUE

The Petition, if granted would appear to make local government planning, zoning and public safety laws (all reflecting management of a public right-of-way) inapplicable to any telecom infrastructure. Thus, a provider could install whatever type of infrastructure in whatever manner it determined in any public right-of-way without review, consent or approval of the local governing body or any of its boards or commissions.

This scenario presents an untenable position for others using the same space. How are preexisting facilities protected? Is the public's own infrastructure subservient to the telecom infrastructure? How are public safety issues addressed? It appears that all of these issues, once a determination by a local town council, will now be determined in Washington, DC. The local governing body would appear to have no authority or ability to insure, as it does with other regulated utilities, whether the purposed infrastructure meets planning and zoning laws and does not present a public safety issue.

V. SMALL CELL SERVICE PROVIDERS WHO HOLD CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY ARE PROTECTED IN WYOMING AND CAN SEEK REDRESS THROUGH NEGOTIATION OF FRANCHISE AGREEMENTS AND RESORT TO THE JUDICIARY RELATING TO FAIRNESS AND ARBITRARY ACTION

The Wyoming franchise framework establishes a collaborative process which, through negotiation, results in an agreement that addresses all of the issues raised by the Petition. Both parties can negotiate terms to their mutual advantage and which protects the interests of each.

Additionally, the small cell provider would have the ability to argue that any action taken in regard to a franchise is an act of arbitrary power and seek resolution from the judicial branch. It appears that the issue Mobilitie has is not in seeking judicial redress, but it wants that redress to start with the Commission in Washington, D.C., not the local town council.

VI. INVERSE CONDEMNATION AND FAIR COMPENSATION ISSUES EXIST

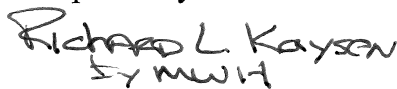
WAM is also concerned that a limitation statutorily placed on what constitutes fair and reasonable compensation could implicate Fifth Amendment and eminent domain provisions of the United States and the Wyoming Constitutions.

It would appear that a constraint on what constitutes fair compensation, in a statute or rule, has the potential to run afoul of a constitutional prohibition. For example, does fair compensation mean “costs associated with issuing permits and managing a right-of-way but no more”? What compensation is made in this scenario for the property interest taken by the provider? Does federal law preempt a determination by a jury as to the property compensation to be awarded if condemnation were to occur? The Petition’s sought declaration also does not appear to reflect the compensation which should be paid if the small cell service provider were to locate its infrastructure in any manner and however it deemed fit without regard to effect on other providers in the same way.

VII. CONCLUSION

The Petitioner is protected in the state of Wyoming under existing law, which the Telecommunications Act specifically acknowledges local governments have a right to enforce. The interpretations of the Act sought by Mobilitie are contrary to the Act’s language and the law in Wyoming.

Respectfully submitted

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By MW14

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